STATE OF MICHIGAN

COURT OF APPEALS

PATTI EILEEN SCHULTZ, f/k/a PATTI EILEEN WAYNICK Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED September 23, 2003
v DOVELYN JAMES WAYNICK, Defendant/Counterplaintiff-Appellant.	No. 243969 Lenawee Circuit Court LC No. 94-015698-DM

PATTI EILEEN SCHULTZ, Plaintiff-Appellee,	
v DOVELYN JAMES WAYNICK, Defendant-Appellant.	No. 246064 Lenawee Circuit Court LC No. 94-015698-DM

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals as of right an order increasing his child support payments and denying his petition for a change of custody. We affirm.

I. Disqualification of the Trial Judge

Defendant first argues that the trial court erred in denying his motion to disqualify the trial judge. When reviewing a motion to disqualify a trial judge, this Court reviews the trial court's findings of fact for an abuse of discretion and the court's application of facts to the law de novo. *Olson v Olson*, 256 Mich App 619, 637-638; ___ NW2d ___ (2003). MCR 2.003(B)(1) provides that a trial judge is disqualified when the judge cannot impartially hear a case due to the judge's personal bias or prejudice against a party or an attorney. In order to prevail on a motion to disqualify a judge brought pursuant to MCR 2.003(B)(1), the moving

party must show actual bias or prejudice against the party or his attorney. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 512 NW2d 210 (1996).

Defendant argues that the trial judge demonstrated his actual bias through his questioning of defendant while he was on the stand during trial, his body language at trial, and his statement at trial that defendant and his attorney were "liars." Defendant argues that the trial judge's questions were designed to assist plaintiff in the establishment of her case and to intimidate defendant and his witnesses. In support of this argument, defendant points to a portion of the trial where the trial judge questioned defendant, while defendant was on the stand as a witness, concerning defendant's claim that the Friend of the Court recommendation and order increasing defendant's child support payments was incorrect.

MRE 614(b) gives the trial court the authority to interrogate witnesses. This Court has stated that "[q]uestions designed to clarify points and to elicit additional relevant evidence, particularly in a nonjury trial, are not improper." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24; 436 NW2d 70 (1989). The trial judge's questions in the present case related to defendant's contention that the Friend of the Court incorrectly calculated the amount of his child support payments. Because the trial judge's questions were designed to elicit testimony regarding child support, which was relevant to the case, and the trial was conducted as a bench trial, we conclude that the trial judge's questioning of defendant did not show that the trial judge was personally biased or prejudiced against defendant or defendant's attorney.

Next, defendant argues that the trial judge exhibited actual prejudice toward defendant and defendant's attorney through his body language and by calling them "liars." Defendant is correct that the trial judge found that defendant was not credible and that defendant's attorney made false statements. But it is the trial court's role in a bench trial to determine the credibility of the witnesses. See MCR 2.613(C); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). And judicial remarks at trial that are critical of, or even hostile to, counsel or a party ordinarily do not support a bias or partiality challenge. *Cain, supra* at 497 n 30. A judge's expressions of impatience, dissatisfaction, annoyance, and even anger are within the bounds of what imperfect men and women sometimes display and ordinarily do not support a bias or partiality challenge. *Id*. The trial judge's finding that defendant was not credible was a proper exercise of the trial judge's power in a bench trial and does not exhibit an actual bias against defendant or defendant's attorney. Thus, defendant has not demonstrated that the trial judge harbored actual bias or prejudice against defendant or his attorney. We conclude that the trial court did not err in denying defendant's motion for disqualification under MCR 2.003(B)(1) because the trial judge did not exhibit actual prejudice or bias against defendant or defendant's attorney.[1]

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[1] Furthermore, untimeliness is a factor in deciding whether a motion for disqualification should be granted. MCR 2.003(C)(1). Defendant raised his motion to disqualify the trial judge on the second day of trial. Under MCR 2.003(C)(1), a motion to disqualify must be filed within fourteen days after the moving party discovers the ground for disqualification. Defendant does not dispute that his motion was untimely.

Defendant also argues that the trial judge should have granted his motion for disqualification on due process grounds. Where the moving party has not met the requirement of showing actual bias or prejudice under MCR 2.003(B)(1), a party may pursue disqualification under the Due Process Clause, which requires an unbiased and impartial decision maker. *Olson, supra* at 642.

> The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Among the situations identified by the Court as presenting that risk are where the judge or decisionmaker
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> (1) has a pecuniary interest in the outcome;
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> (2) "has been the target of personal abuse or criticism from the party before him";
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> (3) is "enmeshed in [other] matters involving petitioner . . ."; or
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> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Cain, supra* at 498, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (citations omitted from *Crampton*; emphasis omitted from *Cain*).]

Defendant argues that situations 2 and 3 existed in the present case. Defendant argues that the trial judge harbored personal animus against defendant and defendant's attorney because defendant and his attorney testified in support of Travis Ballard, an attorney against whom the trial judge's wife had filed a grievance, at an Attorney Grievance Commission hearing attended by the trial judge.

Situation 2 allows disqualification of a judge who has been the target of personal abuse or criticism from the party *before* him. *Cain, supra* at 500. Situation 2 does not apply where the judge was the target of personal abuse or criticism from a nonparty. *Id.* at 515. Defendant argues that the trial judge was the target of criticism and complaints from Ballard, who is not a party to this case. The only connection defendant and his attorney have with the trial judge is the fact that defendant and his attorney testified in support of Ballard at an Attorney Grievance Commission hearing attended by the trial judge. There is no indication that the trial judge was ever the target of any abuse or criticism from defendant. Thus, situation 2 does not apply.

Situation 3 allows disqualification of a judge where the judge is enmeshed in other matters involving the *petitioner*. *Id.* at 501. Defendant argues that the trial judge was enmeshed with matters involving defendant and his attorney through their connection to Ballard. But defendant and his attorney merely testified at Ballard's grievance hearing. The trial judge may have been present at Ballard's hearing when defendant and his attorney testified in support of Ballard, but there is no indication that the trial judge was involved in matters actually involving defendant or defendant's attorney. The trial judge's involvement in the hearing where defendant and his attorney testified in support of Ballard does not rise to the level of being "enmeshed" in

defendant's matters to the extent that disqualification is required. Thus, situation 2 does not apply. We conclude that disqualification was not constitutionally required in this case.

II. Change of Custody

Next, defendant argues that the trial court erred in denying his petition to change the custodial arrangement of the parties' children. In custody cases, this Court reviews for clear legal error a trial court's choice, interpretation, or application of the existing law. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). This Court employs the great weight of the evidence standard to review findings of fact. *Id*. at 5. This Court will sustain the trial court's factual findings unless " 'the evidence clearly preponderates in the opposite direction.' " *Id*., quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The trial court's discretionary rulings, including a determination on the issue of custody, are reviewed for an abuse of discretion. *Id.*

A custody order may only be modified on a showing of proper cause or a change in circumstances. MCL 722.27(1)(c); *Foskett, supra* at 5. Where the party seeking to change a custody order has not carried the initial burden of establishing either proper cause or change of circumstances, the trial court is not authorized to revisit an otherwise valid custody order or consider the statutory best interest factors. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). When confronted with a petition to change custody, a trial court must determine the appropriate burden of proof to place on the party seeking the change. *Foskett, supra* at 5. In ascertaining the proper burden, the trial court must first determine whether an established custodial environment exists. *Id*. "If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child." *Id.* at 6. A determination whether a change in custody would be in the child's best interest is made by weighing the best interest factors set forth in MCL 722.23. *Foskett, supra* at 9. A trial court must consider and explicitly state its findings and conclusions with respect to each of the factors. *Id*.

In the present case, the trial court found that an established custodial environment existed with plaintiff. Defendant argues that the trial court should have found that an established custodial environment existed with respect to both parties, not just with plaintiff. Whether an established custodial environment exists is a question of fact. *Mogle, supra* at 197.

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration "in which the relationship between the custodian and child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). An established custodial environment need not be limited to one household; it can exist in more than one home. *Mogle, supra* at 197-198.

In the present case, plaintiff had sole physical custody of the children since the parties' divorce in 1995, and the evidence shows that plaintiff provided the children with food, clothing and shelter during that time. Plaintiff also testified that she provided the children with a stable environment and discipline. The trial court found that a custodial environment existed with plaintiff because the children lived with plaintiff after the divorce and plaintiff was the primary caregiver. Defendant has not demonstrated that the evidence clearly preponderates in the other direction.

Defendant also argues that the trial court abused its discretion in denying his petition to change custody to joint physical custody. Defendant argues that the evidence supports a change of custody and that the trial court did not state any reasons on the record supporting its decision not to change custody. We disagree. In denying defendant's petition to change custody, the trial court went through all of the best interest factors on the record and made a finding regarding each one. The trial court gave reasons for its findings regarding each factor. The trial court found that eight of the best interest factors favored plaintiff and none of the best interest factors favored defendant. Defendant lists a series of facts to support his argument that the trial court abused its discretion in denying his petition to change custody. But defendant does not argue that the trial court erred in its findings regarding any particular best interest factor or that any specific factual finding was clearly erroneous. Rather, defendant merely highlights portions of his own testimony, without addressing testimony or evidence that does not support his position. Defendant does not specify to which best interest factors this testimony is relevant or how this testimony calls the trial court's findings into question. Defendant's argument on this issue is limited to listing certain pieces of testimony he deems important but without showing how these facts render the trial court's factual findings erroneous or the trial court's rulings clear legal error. Looking at the evidence as a whole and the trial court's findings of fact, we conclude that trial court did not abuse its discretion in deciding not to change custody.

III. Child Support

Finally, defendant argues that the trial court erred in granting plaintiff's petition to increase defendant's child support obligations. We disagree. This Court reviews a modification of a child support order for an abuse of discretion. *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002). The trial court's factual findings, however, are reviewed for clear error. *Good v Armstrong*, 218 Mich App 1, 4; 554 NW2d 14 (1996). A trial court may modify a child support order as the circumstances of the parents and the benefit of the children require. MCL 552.17(1); *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). When determining the amount of child support that is proper, the trial court is required to follow the child support formula developed by the Friend of the Court. MCL 552.605(2); *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). The formula used in establishing and modifying child support is based on the needs of the child and the actual resources of each parent, including the factor of parental income. MCL 552.519(3)(a)(vi); *Shinkle, supra* at 225.

Under the judgment of divorce in the present case, defendant was obligated to pay child support in the amount of $145 a week for both children and $103 a week for one child. Plaintiff filed a petition to increase defendant's child support payments, and the Friend of the Court recommended that defendant's child support payments to be increased to $357 a week for two children and $242 a week for one child. When the trial court adopted this recommendation, defendant objected. After the trial concerning child custody and child support, the trial court

computed defendant's weekly earnings at $2,115.38 and plaintiff's earnings at $690.98, and, based on these figures, decided to set defendant's child support payments at $332 a week for both children and $216 a week for one child.

Defendant argues that the trial court incorrectly computed his weekly income when determining the amount of his child support payment. Specifically, we will address defendant's argument that the trial court erred by including the value of defendant's home as part of his income.[2] When assessing a parent's ability to pay child support, the trial court is not limited to consideration of a parent's actual income, but may consider the parent's ability to pay. *Good, supra* at 5. MCL 552.602(n) defines "income" as any of the following:

> (i) Commissions, earnings, salaries, wages, and other income due or to be due in the future to an individual from his or her employer and successor employers.
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> (ii) A payment due or to be due in the future to an individual from a profit-sharing plan, a pension plan, an insurance contract, an annuity, social security, unemployment compensation, supplemental unemployment benefits, or worker's compensation.
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> (iii) An amount of money that is due to an individual as a debt of another individual, partnership, association, or private or public corporation, the United States or a federal agency, this state or a political subdivision of this state, another state or a political subdivision of another state, or another legal entity that is indebted to the individual.

The trial court's finding that the increase in value of defendant's home was part of his income was based on the fact that defendant is a professional builder and developer of residential homes. Defendant testified that he generally builds and sells five to ten houses a year. It was common practice for defendant to live for two years in one of the houses he built, and then sell the house for profit. By living in the house for two years, defendant could then sell the house and not pay capital gains taxes on the profit. Defendant would then take a percentage of the profits from the sale to use toward a down payment on the construction of a new home. The remaining profit would be reinvested in the new home, and used toward expenses like utilities and mortgage payments.

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[2] Defendant also argues that, in calculating defendant's income, the trial court erred by disregarding defendant's current earnings and expenses, defendant's losses in the stock market, defendant's tax return, and the information provided by defendant's CPA. But defendant does not state what these amounts are, how they affected his income, or why the trial court's alleged failure to consider these amounts rendered its determination of defendant's income erroneous. Because defendant cites no specific factual support for this argument, we need not address it. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Id.*

The trial court found that defendant's equity in his home had increased $50,000 a year for the last four years, and included this increase in equity in calculating defendant's income. We conclude that the trial court's inclusion of this increase in equity in defendant's home as part of his income was not clearly erroneous because the evidence supported the trial court's finding that a large part of defendant's income came from his practice of building houses and selling them for profit after living in them for two years. The trial court found that defendant would, consistent with his past business practice, sell his home for profit. Because the trial court is in a superior position to observe the demeanor of witnesses, this Court defers to the trial court on this issue of credibility. *Mogle, supra* at 201. Thus, we conclude that the trial court did not clearly err in including defendant's increase in equity in his income.

Next, defendant argues that, even if the trial court correctly determined defendant's income, the trial court erred in not deviating from the Friend of the Court's child support formula under MCL 552.605(2). MCL 552.605(2) authorizes a trial court to deviate from the Friend of the Court formula for determining child support "if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate . . . ." Defendant argues that the trial court's order increasing his child support payments exceeds the needs of the children, and, therefore, a large portion of defendant's child support payments will effectively be alimony because plaintiff will use this money for herself. But defendant does not point to any evidence showing what amount of support would sufficiently provide for the children's needs, and defendant's claim that his child support payments will exceed the children's needs is unsupported by any evidence. Therefore, defendant has not shown that application of the child support guidelines formula would be unjust. We conclude that the trial court did not abuse its discretion in failing to deviate from the child support guidelines formula because defendant has not set forth facts which would have warranted the trial court to do so.

Finally, defendant argues that the trial court erred in failing to expressly consider the children's needs in determining the amount of child support.[3] We disagree. In determining the amount of child support, the trial court may only deviate from the Michigan Child Support Formula if application of the formula would be unjust or inappropriate under the facts of the case. MCL 722.717(3). A trial court may not deviate from the formula based on a factor that is already accounted for in the formula. *Burba v Burba (After Remand)*, 461 Mich 637, 648-649; 610 NW2d 873 (2000). The formula is based on the children's needs and the actual resources of each parent. MCL 552.519(3)(a)(vi); *Burba, supra* at 648. Thus, a court cannot deviate from the formula based on the children's needs, because the children's needs are accounted for in the formula. Here, because the trial court followed the formula, and the children's needs are accounted for in the formula, the children's needs were necessarily considered in determining the amount of child support.

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[3] Defendant also argues that the trial court improperly considered "one-quarter of the Defendants [sic] mother's expenses for her home" in determining child support. We reject defendant's argument because there is no indication that the trial court considered defendant's mother's expenses in determining the amount of child support defendant should pay.

Affirmed.

/s/ William C. Whitbeck
/s/ Hilda R. Gage
/s/ Brian K. Zahra